No. 18-60474

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DENTON COUNTY ELECTRIC COOPERATIVE, INC.,
doing business as COSERV ELECTRIC,

Petitioner Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent Cross-Petitioner.

Appeal from NLRB Order - Case No. 16-CA-149330

REPLY BRIEF OF PETITIONER / CROSS-RESPONDENT

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ATTORNEYS FOR PETITIONER CROSS-RESPONDENT

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Summary of Argument

The Board's finding is based on conjecture and unreasonable inference, not substantial evidence. In finding that wage-related conduct constituted unfair labor practices ("ULPs") and caused the disaffection for the Union, the Board ignores evidence of the Union's failure to seek wage increases despite having notice and opportunity to do so. The Board then impermissibly presumes that *any* ULP relating to wages causes disaffection for a union. The record, however, is devoid of any evidence (much less substantial evidence) showing causation. Rather, the **majority** of the unit received raises in 2014 and no employee complained that his raise was insufficient. The record establishes the unit employees were disgruntled with the Union long before the alleged ULPs occurred because for the two-plus years they bargained for a contract, the Union was disorganized and failed to communicate with the unit. Indeed, the Board's holding that CoServ unlawfully withdrew recognition from the Union is not supported by substantial evidence or the law.

Argument

I. Substantial Evidence Does Not Support a Finding that CoServ Violated the National Labor Relations Act.

The Board argues that CoServ departed from its past practice of implementing the Mercer recommendations and deprived the Union of bargaining on this issue. *See* Brief of NLRB 17-20. On the contrary, the record establishes that the Union had ample opportunity to bargain on wages but failed to do so, out of negligence or otherwise.

The Board purports to rely on CoServ's implementation of the Mercer recommendations from 2009 to 2013 to establish that it was a condition of employment, but as is practiced throughout its brief to the Court, fails to cite the record. Brief for NLRB 18. The parties' course of conduct shows that CoServ and the Union agreed that CoServ would implement the 2013 Mercer recommendations, but no such agreement existed for the 2014 Mercer recommendations. *See* ROA.648:22-649:20, 709:5-710:16,.830, 833-839, 945. Rather, in late 2013, CoServ and the Union were preparing to negotiate wages. ROA.225:6-12, 649:7-10, 945. It was incumbent upon the Union, not CoServ, to bargain on behalf of the unit. CoServ was prepared to present a wage proposal but had no duty to make the first proposal. ROA.649:7-20, 709:5-710:14. The Union knew the calendar was turning but failed to make any wage proposal or request bargaining on an interim wage agreement. *Id*.

Only five days into 2014, the Union learned of CoServ's position that it intended to bargain over wages (including the Mercer recommendations). ROA.264:15-22. At that time, only one unit employee had been affected (Shelby) as these recommendations would be implemented on an employee's anniversary date, if it all. Despite this knowledge, the Union waited an ***entire month*** before contacting CoServ – and tellingly did not demand CoServ implement the Mercer recommendations but inquired as to the reason for not doing so. ROA.1429. The very next day, counsel for CoServ explained that CoServ could not unilaterally change a term or condition of employment, and the 2013 implementation of the Mercer recommendations was an interim agreement for 2013. ROA.1428. The Union remained silent on this issue for nearly ***two months***. *See* ROA.271:3-272:7, 1427-1429. The lead negotiator for the Union testified that he certainly "could have" made a proposal, but conceded (for unknown and unstated reasons) that he failed to do so. ROA.273:12-17. The Union therefore admitted that it had an opportunity to bargain on this issue, and that it was not a *fait accompli* when Mr. Cutler learned of it.

The Board cites *Gulf States Mfg. Inc. v. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983) to support its position, but the unilateral change there involved layoffs, and the union only learned who had been affected several days later.

Id. ***That*** was a lack of notice and a *fait accompli*. Here, the Union learned CoServ's position on the Mercer recommendations at a time when only 1 out of 32 unit members had been affected. *See* ROA 1429. The Union therefore had notice as to 31 out of 32 unit members but stalled for ***three months***. The Board's argument, therefore, that "there was no way for the Union to request bargaining or propose anything" is contradicted by record evidence. *See* Brief for NLRB 19.

The Board's reliance on *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93 (5th Cir. 1970) and *Daily News of Los Angeles v. NLRB*, 73 F.3d 406 (D.C. Cir. 1996) is misplaced. In both of those cases, the employer unilaterally refused wage increases to **every** unit member. *Dothan Eagle,* 434 F.2d at 96; *Daily News of Los Angeles*, 73 F.3d at 412. Here, it is undisputed that the **majority** of the unit received raises and no employee complained about the sufficiency of his raise. *See* Brief of Pet. 34 at n. 13. These cases are instructive, however, on other issues. As discussed in *Daily News*, whether an employer must grant or refrain from granting raises during bargaining is not always clear. 73 F.3d at 412–13 ("[T]he Board's precedent in this area has not always been a model of clarity…"). Indeed, courts have recognized the employer's Catch-22:

> Employers, with some justification, have argued that there is a **potential for confusion** and unfairness in rules that may make it

> illegal, on the one hand, to withhold and, on the other hand, to grant, a wage increase.

N.L.R.B. v. Otis Hosp., 545 F.2d 252, 255 (1st Cir. 1976) (emphasis added). A union can avoid this confusion at the outset by making its expectations clear. *See*, *e.g., Daily News*, 73 F.3d at 416. Here, the Union took a passive role, creating a no-win situation for CoServ. In both *Dothan Eagle* and *Daily News*, the expectations on the employer were clear because when the unions learned about the unilateral change they ***timely*** opposed the change and repeatedly demanded that the company reverse the change. *Dothan Eagle,* 434 F.2d at 96; *Daily News*, 73 F.3d at 412 (D.C. Cir. 1996). Here, the Union knew the calendar was changing to 2014, knew that it had not yet received a proposal from CoServ about interim wages but did nothing. ROA.273:12-17. Even after learning that the 2014 Mercer recommendations had not been proposed, the Union delayed for ***three months*** before seeking an interim wage agreement. *See* ROA.1427-1429.

The Board relies on an email from CoServ's counsel dated April 15, 2014 to infer that "[a]ny request from the Union to undo the unilateral change would have therefore been futile." Brief for NLRB 19. That email, however, responded to the Union's untimely demand three months after the Union learned of CoServ's bargaining position on the Mercer recommendations and was the first time the Union sought a 2014 interim wage agreement.

ROA.273:12-17, 1427-1429. By then, the parties were actively negotiating wages. ROA.1427. Had the Union acted in the established course of conduct and proposed an interim wage agreement in late 2013 or early 2014, as CoServ had the previously year, CoServ would have bargained at that time, as it was "always willing to meet and confer about any subject that the [Union] believe[d] should be discussed." ROA.1428. Accordingly, the argument that CoServ deprived the Union of its opportunity to bargain wages does not meet the standard of substantial evidence.

II. Substantial Evidence Does Not Support the Board's Findings that the Alleged ULPs Caused Disaffection for the Union or that CoServ's Withdrawal was Unlawful.

A. The *Master Slack* Factors Weigh Against Finding Causation.

Master Slack makes no exceptions for wage-related ULPs. Courts must analyze the four factors and determine whether the Board has met its burden of establishing the alleged ULPs caused disaffection for a union. Here, the *Master Slack* factors simply do not support causation.

1. *The duration factor is not met by hypothetical situations.*

The duration factor considers the length of time between the ULP(s) and the decertification petition. *See Master Slack Corp.*, 27 NLRB 78, 84 (1984). The question is not "what is the closest in time the ULP ***could*** have occurred to the decertification petition?" Rather, it is: "when, in fact, ***did*** the ULP(s) occur in

relation to the decertification petition?" *See id*. The Fifth Circuit has found causation where an employer committed numerous, egregious ULPs "in the months ***immediately preceding***" the decertification petition. *NLRB v. Hi-Tech Cable Corp.*, 128 F.3d 271, 279 (5th Cir. 1997) (emphasis added). Here, the duration is far longer.

Without the alleged "ongoing" handbook violations to bolster the duration factor, the Board now argues that the failure to implement the Mercer recommendations occurred throughout the year. (Of course, this eviscerates its position that the Union was deprived of notice and opportunity to bargain on this issue.) Without citing the record, the Board speculates that an employee *could have* had an anniversary in October, which *would have* been only one month before the decertification petition. *See* Brief for NLRB 25. There is no evidence in the record that this occurred. The record shows the alleged ULPs occurred 7 and 11 months before the decertification petition. Brief of Pet. 26-29. Regardless, the Board hypothesizes further that employees "later in the year who sought an explanation . . . would be reminded of Vincent's unlawful statements…" Brief for NLRB 26. Again, there is no evidence in the record that *any* employee sought an explanation for his lack of discretionary raise after April 2014, nor that the other employees knew about (much less were "reminded" of) Vincent's alleged comments to Wolzen, Beck, and Shelby.

Indeed, Wolzen testified that Vincent told him that he was not receiving a raise but "the [U]nion would want to give [Wolzen] the most money [he] could get…" ROA.50.10-24. Wolzen admitted that he **did not** discuss this with anyone from CoServ. ROA.80.4-17, 82:19-83:4. Beck testified that Vincent told him his raise "would probably come along later" (ROA.336:3-21) and there is no evidence that he discussed this with anyone. Finally, Shelby testified that he ***only*** discussed his lack of raise (and impliedly, Vincent's related comments) with Wolzen, Beck, and Stephens. ROA.124:22-125:6. There is no evidence that Stephens communicated with other unit members about this topic. Critically, the unit members worked in different departments, on different shifts, in different locations, and had different supervisors. *See* ROA.42:21-43:8, 651:24-652:5, 1387-1426. Accordingly, it is not a reasonable inference that widespread unit members "were reminded" of Vincent's alleged comments later in the year.

The Board's analysis of the duration factor consists of inference upon inference and thus falls well short of the legal standard. As discussed in CoServ's principal brief, absent particularly egregious facts (not present here), the duration of numerous months weigh against finding causation. *See* Brief of Pet. 27-29. The law, therefore, does not support finding that the duration factor weighs in favor of causation.

2. *The nature and tendency of the alleged ULPs do not support a finding of causation.*

The second and third *Master Slack* factors inquire into the nature of the alleged ULP(s) and tendency to cause disaffection. The Court, here, must consider:

1. Does the failure to implement the Mercer recommendations have a tendency to cause widespread disaffection where the employees had no knowledge of the Mercer recommendations?

2. Does a lack of merit-based, discretionary raises to a minority of a unit have a tendency to cause widespread disaffection where the majority of the unit received raises?

3. Do comments blaming a union for the lack of discretionary raises to 3 out of 32 unit members have a tendency to cause widespread disaffection where the unit members have different supervisors, work in different departments, on different shifts, in different locations, and there is no evidence the comments were disseminated?

In answering these questions, the Court should consider the following objective facts:

- The Union bargained for two years and failed to produce an agreement.
- There was no prior allegation that CoServ bargained in bad faith.
- Prior to any alleged ULPs, the unit sought decertification in 2013, which the Union narrowly survived by a **single** vote. ROA.260:7-17, 680:17-19.
- The Union was disorganized and exhibited poor communication.
- The 2014 decertification circulated after yet another year of failed bargaining by the Union.

- There was no finding that CoServ was in any way involved in the decertification petition.

Given this context, the alleged wage-related ULPs do not tend to cause disaffection. Rather, these listed factors establish the cause of the disaffection – the Union's ineffectiveness.

Moreover, the nature of the alleged ULPs are objectively far less egregious than the particularly coercive retaliatory discharges, wage-slashing, coercive promises for wage increases in exchange for anti-union conduct, and other wage-related conduct in cases cited by the Board. *See, e.g.*, *Goya Foods of Florida*, 347 NLRB at 1122; *In re Penn Tank Lines,* 336 NLRB 1066; *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000). The Board likens CoServ's failure to implement the Mercer recommendations to the employer's reassignment of routes and stores in *Goya.* This analogy fails because, in *Goya*, the employer ***took away*** the routes and stores already serviced by unit members and awarded them instead to non-union employees. Here, there is no evidence the unit employees were aware of the Mercer recommendations or of any failure to implement them. Ultimately, the nature and tendency of the alleged ULPs weigh against finding causation.

3. *The Record Establishes the Alleged ULPs Did Not Negatively Impact the Unit's Morale.*

The Board urges the Court to disregard the unit members' testimony on the impact of the alleged ULPs on the unit – even testimony from the General Counsel's witnesses whom the ALJ credited. Brief for NLRB 35-37. Even if the Court were to ignore law showing this testimony must be considered, the fourth factor still weighs against finding causation because ***objective*** evidence confirms the "subjective" testimony that the Union was "disorganized" and "did a poor job communicating…" ROA.422:16-21, 531:9-25. Specifically, the Union's disorganization is clear from the Union's willingness to accept "whatever" wages CoServ proposed (ROA.231:10-19, 324:7-11), and tentatively agreed to a proposal that actually ***decreased*** wages (*see* ROA.102:9-103:23). Similarly, the Union's poor communication is obvious from its unexplained delay in communicating with CoServ regarding the Mercer recommendations (and its failure to make its expectations about wage increases during negotiations clear from the outset). *See* ROA.1327-1429.

Instead, the Board infers wrongdoing from the increase in votes against the Union between the 2013 and 2014 decertification petitions. Brief for NLRB 35; ROA.1806. That is not a reasonable inference, however, because the Union narrowly prevailed in the 2013 decertification election by a single vote. ROA 260:7-17, 680:17-19. Thus, *prior to any alleged ULPs*, support for the

Union was tenuous, at best. It is not surprising, then, that support for the Union continued to wane during the following year the Union's continued disorganization and poor communication. Similarly, the Board infers the alleged statements were widely disseminated merely because they related to wages. *See* Brief of Pet. 30. That is not a reasonable inference, either. The three unit members to whom the comments were allegedly made testified as the G.C.'s witnesses but admitted they did not discuss their lack of raises or Vincent's alleged comments with anyone other than each other and one other unit member. Accordingly, the fourth factor weighs against finding causation.

B. CoServ's Withdrawal of Recognition was Lawful.

Even if CoServ's conduct constituted ULPs, there was no evidence supporting a finding of causation. For this reason, CoServ reasonably relied upon the 2014 decertification petition and was not obligated (or allowed) to negotiate with or provide information to the Union. CoServ's subsequent conduct was therefore lawful.

III. The Board's Ordered Remedies Are an Abuse of Discretion

For the reasons discussed in CoServ's principal brief, the Board abused its discretion in ordering the identified remedies. *See* Brief of Pet. 47-53.

Respectfully submitted,

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